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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

BECHTEL POWER CORPORATION,
Petitioner,

VS.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 57, JAMES K. HOUSEKEEPER AND JAY E. TRINNAMAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

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Petitioners Bechtel Power Corporation and Ronald Weatherred (hereunder collectively referred to as "Petitioner" or "Bechtel") hereby reply to the Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed in the above-captioned action, and supplement the Petition for Writ of Certiorari, pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States, as follows:

Statement of the Case

Respondents' Statement of the Case inaccurately characterizes the nature of Respondents' complaint:

> Without reference to or reliance upon any rights granted under any labor agreement . . . Respondents filed a complaint in state court alleging only violations of state of Utah laws prohibiting such blacklisting.

(Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Response") at 3.) Respondents neglect to mention that paragraph 6 of their complaint (Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Petition") at E-2) explicitly refers to the work rule which is the subject of this litigation. This work rule is incorporated into the collective bargaining agreement which governs Respondents' relationship with Bechtel. Although Respondents have framed their claims under the rubric of state laws, any court adjudicating those claims would necessarily refer to and interpret the work rule which lies at the heart of this action.[1]

Respondents also mischaracterize the nature of this case. The central issue is whether section 301 of the Labor-Management Relations Act ("LMRA") 28 U.S.C. § 185, preempts Respondents' purported state law claims. This issue was the basis for the Tenth Circuit's holding and for the present Petition. By injecting sections 7 and 8 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157-158, into the discussion (Response at 3-4, 6-8), Respondents obscure the Tenth Circuit's improper failure to consider the impact of the application of the relevant Utah state laws on federal labor law and policy.

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[1] The fact that Respondents originally attempted to grieve the present dispute under the procedures provided for in the collective bargaining agreement further belies their attempt to divorce the present action from the terms of the collective bargaining agreement.

Reasons for Granting the Writ

The Tenth Circuit's holding below squarely and irreconcilably conflicts with a recent holding of the Ninth Circuit, as well as prior holdings of other circuits. The Tenth Circuit has applied the well-pleaded complaint rule too broadly by failing to recognize the clear connection between Respondents' state law action and the collective bargaining agreement, and has thereby improperly limited the scope of federal preemption under section 301. Furthermore, the Tenth Circuit erred by holding that Utah statutory and constitutional rights are "nonnegotiable" and therefore beyond the broad preemptive power of section 301.

The Tenth Circuit's Opinion Directly Conflicts With *Utility Workers of America, Local No. 246 v. Southern California Edison*

In addition to the conflicts cited in the Petition for Certiorari (Petition at 5), the Tenth Circuit's opinion conflicts directly with a Ninth Circuit case decided after the filing of the Petition, *Utility Workers of America, Local No. 246, AFL-CIO v. Southern California Edison Company*, 88 C.D.O.S. 2998, Nos. 87-5674, 87-5702 (9th Cir. May 4, 1988), in three important respects: application of the well-pleaded complaint rule, application of section 301 to state constitutional law claims and definition of "nonnegotiable state law rights." (A copy of this opinion is attached hereto as Exhibit A.)

In *Utility Workers*, the union and two individual employees contested the employer's implementation of a drug testing program. As in the present case, plaintiffs initially filed their grievance under the grievance resolution process specified in the collective bargaining agreement. In addition, the plaintiffs subsequently filed an action in state court alleging state constitutional claims, specifically alleging that drug testing violated state constitutional rights of privacy and freedom from unreasonable search and seizure. The employer removed the action to federal court. The district court, *inter alia*, dismissed plaintiffs' state law constitutional claims and plaintiffs appealed from that ruling. On appeal, the Ninth Circuit held that the employees' state constitu-

tional law claims arising out of the employer's implementation of random drug testing are preempted by section 301 of the LMRA.

Given the similarity of the procedural and legal contexts of *Utility Workers* to the present case, the Tenth Circuit's application of the well-pleaded complaint rule here (*see, e.g.*, Appendix to Petition at A-4 - A-7) clearly conflicts with the Ninth Circuit's ruling regarding section 301 preemption. Whereas the Tenth Circuit in the present case held that Respondents' state law constitutional claims "derived entirely from rights and duties created by state law," (Appendix to Petition at A-9), the Ninth Circuit in *Utility Workers* characterized the union's state law constitutional claims as "substantially dependent" upon the analysis of the management rights clause of the collective bargaining agreement. *Utility Workers*, 88 C.D.O.S. at 2999. The Ninth Circuit went on to note: "Because § 301 requires courts to create federal law, federal jurisdiction is not barred by the well-pleaded complaint rule . . . " *Id.* at 2999 n. 2. Thus a clear conflict emerges over the coverage of section 301 with respect to state constitutional claims.

The conflict between the two cases is brought into clearer focus when the nature of the collective bargaining agreements involved is considered. Since the state law claims in *Utility Workers* could not "be resolved without reference to the [management rights clause of the] collective bargaining agreement," *id.*, they were dismissed as preempted under section 301. Here, by contrast, Respondents' complaint relates directly to both a management rights clause (Petition at 3) and to Article VI of the collective bargaining agreement (Petition at 3), which specifically addresses the issue of hiring of employees at the Project. Nevertheless, the Tenth Circuit held that evaluation of Respondents' state law claims was not "inextricably intertwined" with consideration of the terms of the collective bargaining agreement.

The two opinions also conflict in their definition of "nonnegotiable state law rights." In the present case, the Tenth Circuit found that rarely-invoked statutory and state constitutional provisions regarding blacklisting, a form of restriction on employment relationships, were "nonnegotiable." In *Utility Workers*, the Ninth Circuit held that the California's far-reaching constitu-

tional rights to privacy and freedom from unreasonable search and seizure were not "nonnegotiable." The court there stated:

> [A]n employer's decision to institute a drug-testing program is a proper subject for collective bargaining. The question of drug testing obviously implicates important personal rights. To the best of our knowledge, however, no court has held that the right to be free from drug testing is one that cannot be negotiated away, and we decline to make such a ruling here.

Id. It is patently inconsistent for the Tenth Circuit to find that hiring restrictions are sufficiently removed from the collective bargaining process to be "nonnegotiable" while the Ninth Circuit holds that drug testing, notwithstanding its privacy and search and seizure implications, is not a "nonnegotiable" state law right.

Utility Workers therefore conflicts with the Tenth Circuit's holding below in three important respects. First, the two courts differ over the scope and application of the well-pleaded complaint rule. Second, the two circuits reach opposite conclusions regarding the application of section 301 to state law constitutional claims. Third, the definition of "nonnegotiable state law rights" is radically different in each case. These factors demonstrate a square and irreconcilable conflict between the two circuits and illustrate the appropriateness of granting the writ in the present case.

Metropolitan Life is Relevant to the Tenth Circuit's Preemption Analysis Under Section 301

Respondents' attempt to distinguish *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), as a case arising under sections 7 and 8 of the NLRA ignores the importance of *Metropolitan Life* in the present context. *Metropolitan Life* commands that a proper analysis of federal preemption must consider the impact of state law on federal labor concerns. The fact that the Tenth Circuit did not decide the preemption question under the NLRA does not diminish its obligation to consider federal labor law and policy in deciding issues of preemption under

section 301 of the LMRA. *See, e.g., National Metalcrafters v. McNeil,* 784 F.2d 817 (7th Cir. 1986).

CONCLUSION

For the reasons asserted in the Petition and herein, a writ of certiorari should issue.

Dated: May 12, 1988

Respectfully submitted,

PHILIP R. PLACIER
Counsel of Record

APPENDIX A

Cite as 88 C.D.O.S. 2998

UTILITY WORKERS OF AMERICA, LOCAL NO. 246, AFL-CIO, et al,
Plaintiffs-Appellants, Cross-Appellees, v.-
SOUTHERN CALIFORNIA EDISON COMPANY, et al, Defendant-Appellee,
Cross-Appellants.

Nos. 87-5674, 87-5702
D.C. No. CV 86-8250
Central District of California; HUPP, District Judge
Counsel: Glenn Rothner and Adam Radinsky, Reich, Adell & Crost, for Plaintiffs-Appellants. Charles R. Kocher, John W. Evans and Mark E. Mikula, for Defendant-Appellee/Cross-Appellant.
Filed May 4, 1988

Before: GOODWIN, WALLACE and ALARCON, Circuit Judges

GOODWIN, Circuit Judge:

This case requires us to decide whether section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982), preempts a union's claim that an employer's unilaterally implemented drug-testing program violates rights guaranteed by the California Constitution.

Utility Workers of America, Local 246, appeals the order dismissing its state constitutional law claims arising out of the implementation of random drug testing of employees by Southern California Edison (SCE) at its San Onofre Nuclear Generating Station. SCE cross-appeals from the district court's refusal to dismiss Local 246's breach of the collective bargaining agreement claim and from its decision to enter a preliminary injunction against random drug testing.[1]

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[1] Appellants ask us to strike portions of appellee's reply brief on the ground that these portions cover subject matter which is beyond the

In September 1984, SCE began annual drug-screen urinalysis for all employees seeking "unescorted access" into the security area encompassing the San Onofre plant's nuclear reactors. SCE instituted the drug testing requirement without prior negotiations with Local 246, the collective bargaining agent for employees at the San Onofre facility. Local 246 filed a grievance asserting that institution of the program violated the collective bargaining agreement.

Local 246 also filed a charge with the National Labor Relations Board (NLRB) alleging that SCE's unilateral implementation of the program constituted an unfair labor practice. The NLRB deferred the unfair labor practice charge to arbitration, and Local 246 failed to pursue that matter further.

Beginning about December 1, 1986, SCE modified its drug-testing program. Under the new system, plant employees—chosen at random by a computer—would be required to produce urine samples for testing on one day's notice. SCE implemented the modifications without first bargaining with Local 246.

On December 8, 1986, Local 246 filed a grievance asserting that SCE violated the collective bargaining agreement by instituting the random drug-testing program without first bargaining in good faith. Local 246 concedes that this grievance now is proceeding in accordance with the grievance-resolution mechanisms created by the collective bargaining agreement.

On December 10, 1986, Local 246 and two plant employees filed an action against SCE in state court, alleging that the drug-testing program violated rights guaranteed under the California Constitution to privacy and freedom from unreasonable searches and seizures. *See* Cal. Const. art. I, § 1 (right to privacy); *id.* art. I, § 13, (prohibition of unreasonable searches and seizures). The complaint also alleged that SCE had violated the collective

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scope of the final brief in a cross-appeal. Although we recognize that the discussion in these portions has peripheral relevance to those matters properly addressed upon cross-appeal, we grant appellants' motion to strike because appellee has had ample opportunity to discuss the claims in its opening brief.

bargaining agreement and sought injunctive and declaratory relief.

After the state court issued a temporary restraining order enjoining random drug testing, SCE removed the case to federal district court. On February 11, 1987, the district court issued an order dismissing the state constitutional claims as preempted by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982). The district court also issued a preliminary injunction against implementation of random drug testing, pending resolution of the grievance. Each party has appealed from the part of the order unfavorable to it.

We review de novo the question whether section 301 preempts state law. *See Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 565 (9th Cir. 1987). We begin, as always, with the language of section 301:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . .

29 U.S.C. § 185(a)(1982).

Section 301 "expresses a federal policy that the substantive law to apply in § 301 cases 'is federal law, which the courts must fashion from the policy of our national labor laws.'" *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (*quoting Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957)). The preemptive force of section 301 "is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar Inc. v. Williams*, 107 S.Ct. 2425, 2430 (1987) (*quoting Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542, 1547 (1987)).[2]

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[2] Because § 301 requires courts to create federal law, federal jurisdiction is not barred by the well-pleaded complaint rule, under which a defendant may remove a case based upon federal jurisdiction only where a federal question would appear on the face of the plaintiff's properly pleaded complaint. *See Gully v. First Nat'l Bank in Meridian*, 299 U.S.

Preemption of state-law claims is inappropriate where state causes of actions "confer[ ] nonnegotiable state-law rights on . . . employees independent of any right established by contract." *Allis-Chalmers*, 471 U.S. at 213. "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Id.* at 220.

Local 246's constitutional claims are "substantially dependent" upon the analysis of the collective bargaining agreement and they constitute a properly negotiable subject for purposes of collective bargaining. Resolution of the issue whether Local 246 has bargained away its members' claimed constitutional rights must rest upon Articles VI and X.N of the collective bargaining agreement, which recognize SCE's right to manage the plant, to direct the working force, and to implement reasonable safety rules and require their observance. Thus, we find that Local 246's state-law claims cannot be resolved without reference to the collective bargaining agreement and that they should therefore be dismissed as preempted by section 301.

Drug testing does not implicate the sort of "nonnegotiable state-law rights" that preclude preemption under section 301. *See Allis-Chalmers*, 471 U.S. at 213. As Local 246 argued when it filed its charge of unfair labor practices in 1984, an employer's decision to institute a drug-testing program is a proper subject for collective bargaining. The question of drug testing obviously implicates important personal rights. To the best of our knowledge, however, no court has held that the right to be free from drug testing is one that cannot be negotiated away, and we decline to make such a ruling here.[3]

109, 112-13 (1936). Even if state law would provide a cause of action in the absence of section 301, preemption under section 301 creates an exclusively federal cause of action. *See Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983).

[3] Our conclusion is not altered by the recent decisions in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988), or the companion cases of *Brotherhood of Locomotive Eng'rs v. Burlington N.*

We reject Local 246's argument that *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 862-63 (9th Cir. 1987), petition for cert. filed Nov. 25, 1987, mandates a finding that its claims are not preempted by section 301. The *Paige* court, in holding that section 301 did not preempt a tort action based upon California's OSHA regulations, found that a private right of action was created to enforce this state regulatory scheme, not to regulate the employment relationship. *See id.* at 863. Thus the court held that this private right of action "exists independent of any contractual right." *Id.* Here, however, the constitutional rights claimed by Local 246 pose a "significant threat to the collective bargaining process" and promote no "state interest in protecting the public transcending the employment relationship." *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 1001-02 (9th Cir. 1987) (interpreting *Paige*). *Paige* therefore is inapplicable to this case.

We also find inapposite our recent decision in *Tellez v. Pacific Gas and Elec. Co.*, 817 F.2d 536, 539-40 (9th Cir.), *cert. denied*, 108 S.Ct. 251 (1987). *Tellez* held that section 301 does not preempt claims alleging intentional and negligent infliction of emotional distress where the collective bargaining agreement "is silent on working conditions, and vague on disciplinary formalities" so that "examination or interpretation of the agreement would not help to resolve [plaintiff's] claim." *Id.* at 539. Here, by

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R.R. Co. 838 F.2d 1087 (9th Cir. 1988), and 838 F.2d 1102, *petition for cert. filed* 56 U.S.L.W. 3720 (April 1, 1988) (9th Cir. 1988) although *Burnley's* holding that drug testing of railway employees violated the fourth amendment suggests the importance of the rights asserted here, *see Burnley*, 839 F.2d at 579-82, this determination in no way suggests that such rights are nonnegotiable; the prevalence of collective bargaining agreements authorizing searches of employees' possessions strongly suggests that drug testing provisions would be negotiable. The panel's finding in the two *Burlington Northern* cases that the dispute was major rested not upon the importance of the issue but upon the fact that the issue was "neither contemplated nor arguably covered" by a collective bargaining agreement. *Burlington Northern*, at 1091 (*quoting International Ass'n of Machinists v. Aloha Airlines, Inc.* 776 F.2d 812, 816 (9th Cir. 1985)). These recent cases therefore do not hold that nonnegotiable constitutional rights preclude unions from bargaining over drug testing programs.

contrast, we have found it necessary to examine the collective bargaining agreement to determine whether it has been breached.

We reach the same result as the other courts that have considered the question whether section 301 preempts state-law claims brought to seek invalidation of an employer's drug-testing program, including those founded on state privacy claims. *See Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256 (4th Cir. 1987); *Strachan v. Union Oil Co.*, 768 F.2d 703, 704-06 (5th Cir. 1985); *Association of Western Pulp and Paper Workers v. Boise Cascade Corp.*, 644 F.Supp. 183, 186-87 (D. Or. 1986). Although these cases involved state tort claims rather than state constitutional claims, the Supremacy Clause declares the primacy of federal law over state constitutional provisions as well as over state common and statutory law. *See* U.S. Const. art. VI, cl. 2.

We therefore affirm the district court's finding that section 301 preempts Local 246's state-law challenges to SCE's drug testing program, notwithstanding that its claims are based on rights guaranteed under the California Constitution. This holding makes it unnecessary for us to consider SCE's claims that Local 246's state-law claims are preempted because the San Onofre plant is located on a federal enclave or because the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1982 & Supp. III 1985), grants exclusive legislative power over the facility to the federal government.

The district court held that it had concurrent jurisdiction with the NLRB over Local 246's claim that SCE breached the collective bargaining agreement by instituting a unilateral change in terms and conditions of employment and by refusing to bargain over such changes. The misconduct alleged by Local 246 also would constitute unfair labor practices in violation of sections 8(a)(1) and 8(a)(5) of the NLRA.[4] *See* 29 U.S.C. § 158(a)(1)

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[4] On September 8, 1987, the NLRB's Office of the General Counsel recommended that drug testing for current employees and job applicants be deemed a mandatory subject of bargaining under section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1982). *See* Office of the General Counsel to the National Labor Relations Board, Memorandum GC 87-5 (Sept. 8, 1987). Because we find that federal courts lack jurisdiction at this

(1982); 29 U.S.C. § 158(a)(5) (1982). Indeed, Local 246's claim for breach of contract is based upon SCE's alleged violation of Article I of the collective bargaining agreement, which provided that "[t]he Company agrees to recognize the rights of employees as set forth in Section 7 of the National Labor Relations Act."

"When an activity is arguably subject to § 7 or § 8 of the Act, . . . federal courts must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245 (1959). However, district courts have concurrent jurisdiction with the Board in cases where an alleged unfair labor practice also violates a collective bargaining agreement. *See Smith v. Evening News Ass'n,* 371 U.S. 195, 197 (1962).

We find it unnecessary to determine whether the NLRA preempts Local 246's claims. "The usual rule in the field of labor law is that where administrative procedures have been instituted for the resolution of disputes between parties to a collectively bargained or other agreement, the courts will generally require the exhaustion of those procedures before exercising the jurisdiction they might otherwise have over disputes subject to resolution through said procedures." *Amato v. Bernard,* 618 F.2d 559, 566 (9th Cir. 1980).

Federal labor policy places great weight upon ensuring the availability of grievance procedures as "a uniform and exclusive method for orderly settlement of employee grievances." *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 653 (1965). "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581 (1960). "A

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time to determine whether SCE has violated the collective bargaining agreement, we need not consider the issues whether the General Counsel's recommendation should be applied retroactively or whether SCE's existing drug-testing program permitted it to modify the program without bargaining.

rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Allis-Chalmers,* 471 U.S. at 220.

Because Local 246 has not complied with available grievance procedures, the district court could not hear the union's claim for breach of the collective bargaining agreement even if it shares jurisdiction with the NLRB. Accordingly, we reverse the part of the district court's order declining to dismiss Local 246's claim for breach of contract.

We affirm the part of the district court's order dismissing Local 246's claims that SCE's drug-testing program violates the California Constitution because the state causes of action are preempted by section 301. We reverse the part of the district court's order finding federal jurisdiction over Local 246's claims for breach of contract because Local 246 has failed to exhaust available grievance procedures. The district court lacked jurisdiction over the case and therefore has no power to issue a preliminary injunction against SCE's drug testing. The case is remanded to the district court with instructions to dissolve the preliminary injunction pending resolution of the dispute through the grievance process.

AFFIRMED in part, REVERSED in part, and REMANDED.